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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 352, 353

KENT FOOD CORP. AND CLARK-IGER FOOD PRODUCTS CO., INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 59-63) is reported at 168 F. 2d 632. The opinions of the District Court (R. 23-25, 44-45) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 16, 1948 (R. 63-65), and a petition for rehearing was denied July 19, 1948 (R. 75-76). The petition for a writ of certiorari was filed October 15, 1948. The jurisdiction of the court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Was the respondent's appeal from the decree of the District Court timely?

2. Did the District Court, after the entry of a decree condemning adulterated articles of food, have the power to release those articles for export in the same adulterated condition which constituted the basis for the condemnation?

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides:

> Sec. 304(a) [21 U.S.C. 334(a)].
>
> Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found * * *.
>
> Sec. 304(d) [21 U.S.C. 334(d)].
>
> Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be

sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: *Provided,* That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such articles shall not be sold or disposed of contrary to the provisions of this Act or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Act under the supervision of an officer or employee duly designated by the Administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. * * *

Sec. 402 [21 U.S.C. 342(a)(3)]. A food shall be deemed to be adulterated—

* * * * * *

(a)(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food. * * *

Sec. 801(d) [21 U.S.C. 381(d)].

A food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this Act if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for

export. But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this Act.

STATEMENT

On February 26, 1947, two libels of information were filed by the United States in the District Court for the Eastern District of New York, pursuant to Section 304(a) of the Federal Food, Drug, and Cosmetic Act, for the seizure and condemnation of two separate lots of tomato catsup, consisting of 902 and 215 cases, respectively, which had been shipped in interstate commerce from Bay City, Michigan, to Brooklyn, New York, and Maspeth, Long Island. Each of the libels alleged that the food was adulterated in interstate commerce within the meaning of Section 402(a)(3) of the Act in that it consisted wholly or in part of decomposed tomato material. (R. 3-5; see also R. 1-2, 10, 29.)

Kent Food Corp. and Clark-Iger Food Products Co., Inc., petitioners here, appeared in the proceedings as claimants (R. 6-7, 8-9), and the libels were consolidated (R. 29). No answers to the libels were filed. Instead, petitioners filed a motion "for an order approving a consent to a decree of condemnation" which would permit release of the articles to petitioners for export (R. 10-11). Attached to this motion was an affidavit of an officer of Kent Food Corp. (R. 12-18) in which it was

alleged that the catsup was originally intended for export; that the manufacturer, Beutel Canning Company of Bay City, Michigan, had secured permission from the state health department to ship the catsup out of Michigan for export; that Andre Trading Company, from whom petitioners purchased the catsup, had not informed them that it was to be sold only for export; and that the lot of 902 cases which was seized in the warehouse of Sweet Life Food Corp. had been sold to Sweet Life by petitioners, and that Sweet Life had in turn sold it for export (R. 12-15).[1]

The court entered a memorandum opinion (R. 23-25) on July 3, 1947, granting the motion and permitting (R. 24-25):

> * * * the entry of a decree of condemnation which will provide for release of the goods to the owner, under such terms and conditions as may be suggested by the Government, so that the goods may be exported in compliance with the provisions of Sec. 381(d). I believe the section last mentioned applies, because I find as a fact on the papers before me that the good were intended for export while in the hands of the claimants although the seizure was justified because there was no literal compliance with the statute * * *.

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[1] The lot of 215 cases involved in the other libel was seized in the warehouse of Kent Food Corp. and it is the sole claimant of this lot (R. 12-13).

On July 16, 1947, a decree of condemnation was entered (R. 26-29), which provided for the release of the catsup to petitioners for the purpose of preparing it for export "in compliance with the provisions of 21 U.S.C.A., Section 381(d)."

On September 10, 1947, the Government moved for reargument and for an order vacating the court's order of July 16, 1947, permitting release of the goods for export (R. 30). Attached to this motion were affidavits of two employees of the Food and Drug Administration (R. 32-36, 37-38) which showed that the catsup had been "produced in whole or material part from rotten tomatoes" (R. 37-38); that Kent Food Corp. had ordered 4000 cases of this brand of catsup from Andre Trading Company in September 1946 on the express understanding that it was to be sold for export only; that Kent had sold 285 cases of the catsup to its customers in the New York Metropolitan area, and another 2500 cases to a dealer in Scranton, Pennsylvania, which had been seized and was the subject of other litigation; and that in respect of the lot sold to Sweet Life, it was "mere coincidence" that the latter had sold it for export, since that corporation had stated to the affiant that it did not receive any specification that the catsup was to be sold for export only (R. 33-35).

On October 22, 1947, the court entered a memorandum opinion (R. 44-45) finding that petitioners did not intend to export the goods but planned to

dispose of them in the domestic market, but holding nevertheless that the court had discretionary power to permit the food to be exported, even though it could not be brought into compliance with law, so long as it is fit for human consumption and accords with specifications of foreign purchasers and is not in conflict with the laws of the country to which it is to be sent. Accordingly, on October 29, 1947, an order was entered granting the Government's motion for reargument, but adhering to the terms of the decree of condemnation entered on July 16, 1947 (R. 46-48).

A notice of appeal from the orders of July 16 and October 29, 1947, was filed by the Government on December 17, 1947 (R. 49). A motion by petitioners to dismiss the appeal on the ground that it was untimely (R. 54-58) was denied by the Court of Appeals on March 1, 1948 (R. 58). Thereafter, the Court of Appeals reversed the judgment of the district court in so far as it released the articles to petitioners for export, holding that such provisions of the decree were beyond the power of the court. It remanded the proceeding "for the elimination of these provisions and for the substitution of provisions appropriate to the condemnation of the articles under 21 U.S.C.A. §334 (d)." (R. 63.)

ARGUMENT

1. Petitioners' contention (Pet. 25-27) that the Government's appeal was not timely is without merit. As pointed out in the Statement, *supra*,

p. 6, the Government's motion of September 10, 1947, asked for reargument of the portion of the order of July 16, 1947, which released the catsup to petitioners for export sale, and the motion was supported by an affidavit showing that petitioners did not intend to export the goods but were selling them domestically. This evidence established that the court was mistaken in its understanding, as expressed in its opinion of July 3, 1947 (R. 23-25), that the catsup was intended for export. Although the Government's motion was not filed within 10 days after the entry of the order of July 16,[2] it was entertained by the district court, the court re-examined the original order in the light of the motion, concluded that petitioners did not intend to export the goods but planned to dispose of them domestically, but determined that nevertheless the court had power under the statute to release the goods for export. In these circumstances, the time for appeal ran from the date of the order on the motion. See *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144; *Bowman* v. *Loperena*, 311 U. S. 262; *Wayne U. Gas Co.* v. *Owens Co.*, 300 U. S. 131; *Babler* v. *United States*, 137 F. 2d 98 (C.C.A. 8); *United States* v. *Schlotfeldt*, 136 F. 2d 935 (C.C.A. 7); cf. *Safeway Stores* v. *Coe*, 136 F. 2d 771 (App. D.C.), involving an untimely motion

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[2] See Rule 59 (b), Rules of Civil Procedure, prior to the amendments which became effective in March, 1948.

for rehearing based upon a later appellate decision.

2. It is undisputed that the tomato catsup was adulterated, as that term is defined in Section 402(a) (3), in that it consisted wholly or in part of decomposed tomatoes. The shipment of such adulterated food in interstate commerce (except in compliance with the conditions of the export exemption of Section 801(d)) subjects it to seizure and condemnation under Section 304. Where a district court has, as here, decreed the condemnation of adulterated food, the disposition of the food is governed by Section 304(d). The latter subsection provides three alternative dispositions: (1) destruction, (2) sale in compliance with the Act and the laws of the jurisdiction, or (3) delivery to the owner for destruction or to be "brought into compliance with the provisions of this Act" under the supervision of the Food and Drug Administration. Admittedly, the adulterated catsup could not be sold in compliance with the Act, and, admittedly, the composition of the catsup with the resulting high mold count could not be changed or improved, i.e., "brought into compliance," so that it would no longer be adulterated within the meaning of the Act. Thus, the district court was required to order the destruction of the catsup unless, as the petitioners contended and the district court held, the Act authorized the court to release it to them for export.

The district court held that Section 801(d) of the Act empowered it to release the catsup to the petitioners for export. That subsection provides:

> A food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this Act if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for export. But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this Act.

The quoted language obviously provides an exemption, upon compliance with the stated conditions, from the consequences of transporting adulterated food in commerce. Where food is found to be adulterated within the definition of Section 402(a), the burden is upon the claimant asserting this exemption to show (1) that the food was intended for export, and (2) that there has been compliance with the enumerated conditions of Section 801(d).

In the district court's original opinion, it was found that the catsup was intended for export (R. 25). There was no finding, nor did the present petitioners even allege, that the catsup accorded to the requirements of any particular foreign purchaser or that it was not in conflict with the laws

of the country to which export was intended. In the district court's modified opinion after reargument, and upon undisputed evidence of domestic sales of such catsup by petitioner Kent Food Corporation, it was specifically found that the claimants "did not intend to export the goods, but planned to dispose of them in the domestic market." (R. 45.)

The petitioners contend, although the district court did not specifically adopt this reasoning, that the power given to a district court by Section 304(d) to release condemned food to the owner to be "brought into compliance with the provisions of this Act", embraces the power to release adulterated food for an export sale in which the food would no longer be regarded as adulterated for the purposes of the Act (Pet. p. 29). In fact, the petitioners even contend that when the export exemption of Section 801(d) is destroyed by domestic sales, it may be restored by re-diverting the goods to the export market (Pet. p. 31).

We believe that the Court of Appeals was clearly correct in reversing the District Court and in holding that Section 801(d) does not provide district courts with an additional alternative disposition of adulterated food condemned under Section 304.

The position of Section 801(d) in the Act as part of a different title than Section 304, as well as the fact that the export provisions of Section

801(d) derive from a similar provision in the Food and Drug Act of 1906,[3] indicate that the export provisions were not intended to constitute an alternative method of disposing of condemned food. The purpose of the export provisions is to allow American producers to export to foreign countries foods, drugs and cosmetics which, while adulterated by American standards, are acceptable to the countries to which they are exported. The American producer of such substandard food may not, under Section 801(d), ship such food in interstate commerce in the vague hope of finding a foreign purchaser, and with the risk that such food may be diverted to domestic consumption. Rather, the movement in commerce of such food subjects it to condemnation unless, in compliance with the express requirements of Section 801(d), the shipping packages are labelled to show intention to export, and the food is from the outset consigned to a specific foreign purchaser whose specifications are satisfied in compliance with the laws of his country.

Admittedly, when this proceeding was commenced, no foreign purchaser had been found for the catsup here involved (R. 41). Obvious practical considerations indicate that this export exemption is not an *ad hoc* matter—to be seized upon by a detected purveyor of adulterated food. Rather, Section 801(d) provides a narrow channel

[3] Section 2 of the Act of June 30, 1906; 34 Stat. 768.

—beginning with the initial movement in commerce —by which foods which are below our standards may be utilized solely for export to foreign countries willing to receive them. On its face, therefore, this export provision was not designed to provide a seller of adulterated goods in the domestic market with a last minute "out" from the consequences of condemnation—in this case destruction, since the catsup could not be made to meet the statutory requirements for sale in the United States.

The District Court's construction of Section 801(d) in relation to Section 304 holds out an attractive vista to the owner of adulterated food; with impunity he may ship in interstate commerce in search of a market, any market—and if the adulterated shipment is detected, he simply cries, "For export", thus minimizing the statutory liabilities for making such shipments. The distinction between legitimate export shipments which are at all times earmarked as such, and the maneuvering of a detected purveyor of adulterated food, becomes hopelessly blurred if the latter may at any stage invoke the discretion of a district court to allow such food to be diverted to export.

In any event, the last sentence of Section 801(d) provides that "if such article [a food, drug or cosmetic intended for export] is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this Act."

In other words, since the undisputed evidence and the finding of the District Court is that part of this batch of catsup had already been sold domestically (R. 34-35, 40, 44-45), the export provisions of Section 801(d) are by their terms inapplicable, and the disposition of the adulterated catsup is governed entirely by Section 304(d). Also, it should be noted, even if the original shipment of the catsup was exempt from condemnation by reason of compliance with the export provisions, that exemption was destroyed by the domestic sales.

The petitioners' contention that the power of the district court under Section 304(d) to deliver condemned food to the owner to be "brought into compliance" with the Act includes the power to allow such food to be exported, boils down to the argument that the subsection permits release of the food to be "sold in compliance with the Act" (Pet. pp. 6-7). The short answer to this is that Section 304(d) does not so provide. "Brought into compliance" means such reconditioning, reprocessing, or relabelling of the product as will remove the grounds upon which it was condemned as adulterated. In the same subsection, it is to be noted, when Congress desired to refer to sales it did so specifically, from which it can only be concluded that the phrase "brought into compliance" means exactly that, and does not include disposition by sale.

If there were any remaining doubt as to the issue, it would be resolved by the cardinal principle

of so construing the Food, Drug, and Cosmetic Act as to give effect to the Congressional purpose of assuring this country a pure supply of the commodities covered by the Act. This basic purpose can be fulfilled only by giving the export provisions of Section 801(d) a literal and natural construction which will not make that subsection a last-minute haven for every claimant of admittedly adulterated foodstuffs.

CONCLUSION

The decision below is correct. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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NOVEMBER 1948.

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CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Number ——.

R. W. CLAXTON, INCORPORATED, PETITIONER

vs.

BOYD F. SCHAFF, ET AL, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, R. W. Claxton, Incorporated, being aggrieved by the decision of the United States Court of Appeals for the District of Columbia, handed down on the 28th of May, 1948, in the certain case or matter entitled before it as "R. W. Claxton, Inc., appellant, v. Boyd F. Schaff et al, appellees, No. 9609," now reported in 169 F (2d) 303, respectfully represents and shows unto the Court that:

I.

Statement of Matters Involved.

Petitioner is engaged in the business of selling seafood in the District of Columbia, and operates certain trucks in making deliveries to its customers. On the 7th of May, 1941, petitioner made a delivery of 7½ pounds of halibut fish to the Fat Boy Restaurant on New York Avenue near Bladensburg Road, N. E., in the District of Columbia. The restaurant sets back from the street, and has a private driveway around the building with parking space in the rear. About 7:40 A. M. on said date petitioner's driver drove its truck onto said private property and parked near the rear door of said restaurant, for the purpose of making said delivery. The driver expected to be in the restaurant only a few minutes, and left the ignition key in the switch while he went inside the restaurant to make the delivery. At that hour of the day, the restaurant was closed, and there were no persons loitering about the vicinity.

While the driver was inside, two employees of the restaurant, who had been at work in the kitchen when the driver entered the restaurant, went outside and got in the truck and drove it away.

Respondents were riding in the automobile of respondent Schaff, proceeding on West Virginia Avenue (some distance away from the restaurant), when their automobile was struck by petitioner's truck. The thief who was driving the truck was operating it at a fast rate of speed, and, in attempting to pass another automobile, either pulled over too far on the wrong side of the road, or temporarily lost control of the truck, and struck the automobile in which respondents were riding. The automobile was substantially damaged, and each of the respondents sustained some personal injuries.

Initial Proceedings in District Court

On the 6th day of June, 1942, respondents brought this action against petitioner in the United States District Court for the District of Columbia, alleging that it should respond in damages for their injuries, because, as they said, petitioner's truck at the said time and place "Was driven on said Avenue by a driver as agent of, and with the consent of, defendant," and that the collision was caused by the negligence of the petitioner's said agent (R-3). Petitioner answered, denying that its truck was operated by its agent or by any person with its knowledge or consent (R-4).

Upon the issue thus made (R-5), the case duly came on for trial. The evidence disclosed that the truck had been taken by one Matthews without the authority or permission of the petitioner; and the Court directed the jury to return a verdict in favor of petitioner, upon which judgment for petitioner was entered.

The respondents took an appeal to the United States Court of Appeals for the District of Columbia.

Decision of U. S. Court of Appeals on First Appeal

While the appeal was pending the said Court of Appeals handed down its decision in the case of *Ross* v. *Hartman* (78 U. S. App. D. C. 217, 139 F. (2d) 14), wherein the Court held that the violation of a traffic ordinance against leaving a vehicle unattended *in a public place* with the ignition unlocked and the key in the switch was negligence, and that such negligence might be deemed the proximate cause of the injuries sustained when the unknown person who drove the vehicle away negligently struck the appellant, overruling the prior decision of the Court in the case of *Squires* v. *Brooks* (44 App. D. C. 320).

When respondents wrote their brief as appellants in said appeal, they added an "additional" point, asserting that they had been prevented by the rule established in *Squires* v. *Brooks* from urging that petitioner was liable to respond in damages because its driver left the key in the ignition

switch, and also contending that the said vehicle had been left parked in a "public place."

The said Court of Appeals, with then Chief Justice Groner dissenting, reversed the judgment of the District Court, and remanded the case for a new trial (79 U. S. App. D. C. 207; 144 F. (2d) 532).

The full text of the Court's opinion is as follows:

> "This is an appeal by the plaintiffs from a judgment for the defendant, upon a directed verdict, in a suit for personal injuries.
>
> "The complaint alleged that appellants were injured by the negligent operation of appellee's truck by his agent. The only negligence alleged in the complaint was in the actual driving of the truck at the time of the accident. But the evidence showed that appellee's driver left the truck, with the keys in it, in the parking space beside a restaurant to which he was delivering goods for appellee, and that employees of the restaurant drove off in the truck and injured appellants.
>
> "*Squires* v. *Brooks*[1] held that the intervening act of a third person who helps himself to a car protects the driver who left the keys in the car from responsibility for a resulting accident. But the recent case of *Ross* v. *Hartman*[2] overruled the *Squires* case. It is true that the *Ross* case involved the violation of an ordinance against leaving an unlocked car in a "*public place*,"[3] and we do not think that a restaurant's private parking space is a "public space" within the meaning of the ordinance. But we said in the *Ross* case: "In the absence of an ordinance * * * leaving a car unlocked might not be negligent in some circumstances, although in other circumstances it might be both negligent and legal or 'proximate' cause of a resulting accident."[4] Under that ruling, the evidence in the present case should have been submitted to the jury with instructions to find for the plaintiffs if they found that

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[1] 44 App. D. C. 320.

[2] 78 U. S. App. D. C. 217, 139 F. 2d 14.

[3] Traffic and Motor Vehicle Regulations for the District of Columbia, § 58.

[4] 78 U. S. App. D. C. 217, 139 F. 2d 14, 15. Cf. *Maloney* v. *Kaplan*, 233 N. Y. 426, 135 N. E. 838.

the defendant's driver was negligent in leaving the car unlocked and that this negligence was a proximate cause of the accident.[5]

"Appellee contends that the issues on appeal should be confined to those which were duly presented at the trial. This of course is commonly true. But this suit was tried before the *Ross* case had overruled the *Squires* case. Therefore appellant did not have a fair chance to raise and press at the trial, nor the court to pass upon, the point concerning the keys. "We have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."[6] "On the appeal • • • the case should be disposed of under the law as determined by the later decisions."[7] The case will therefore be remanded for a new trial.

Remanded for a new trial.

"GRONER, C. J., *dissenting*: Plaintiffs brought this action, based on the presumption of agency arising from defendant's ownership of the vehicle and the negligence of the driver. The case was tried on that issue and resulted in a judgment of acquittal of the defendant.

"Since, as I understand, we all agree that on the issue made the case was properly decided, I think we should affirm rather than send the case back for a new trial on a totally different issue."

SUBSEQUENT PROCEEDINGS IN DISTRICT COURT

Upon the mandate of the said Court of Appeals, the District Court on the 18th of June, 1945, entered an order vacating and setting aside the judgment for petitioner, and restoring the case to the docket and trial calendar for

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[5] It was evidently not a proximate cause if, as some of the testimony tended to show, defendant's driver invited the restaurant employees to take the car.

[6] *Patterson* v. *Alabama*, 294 U. S. 600, 607, 55 S. Ct. 575, 578, 79 L. Ed. 1082.

[7] *Ruppert* v. *Ruppert*, 77 U. S. App. D. C. 65, 68, 134 F. 2d 497.

further proceedings (R-6). On the 29th of October, 1946 respondents filed a motion for leave to amend their complaint (R-7), proposing to amend paragraph 5 of their complaint by substituting a new paragraph 5, alleging that petitioners' agent "negligently and carelessly left said truck unattended and with the ignition key remaining in the lock, while said servant went inside said restaurant for delivery of fish," that two other persons then entered said unattended truck and finding the key in the ignition lock, drove it on the highway until the collision occurred, and that said collision was proximately caused by the negligent action of petitioners' agent in leaving said truck unattended without removing the key from the ignition lock. The court granted respondents leave to so amend their complaint (R-9). Petitioner thereupon filed an answer to the amended complaint (R-9).

Thereupon the case came on for pretrial hearing on the 17th of February, 1947 and by agreement of counsel it was stipulated that "the only issues to be tried in view of the decision of the Court of Appeals is that of negligence of the defendant in leaving the truck unattended with the ignition key therein and the negligent operation of the truck by the person operating it and whether or not acts of negligence of the defendant was the proximate cause of the injuries sustained by plaintiffs" (R-10, 11).

The case duly came on for trial upon the issues so presented. For the first time, the parties addressed themselves to the development of the evidence respecting the "circumstances" under which the truck was left unattended with the key in the ignition switch for a few minutes while the driver went inside the restaurant to make the delivery, and under which the said truck was stolen or taken without permission and driven away.

The respondents called *Luther Matthews,* who testified that he was employed at the Fat Boy Restaurant on the 7th of May, 1941, as a helper and handyman (R-21); that he had just finished cutting up some chicken when the truck came with a delivery of fish, and he and Hills and

another boy went for a ride for the first time with Roscoe (R-22); that the keys were in the truck, and the collision took place as he was hurrying to get back to Fat Boy's (R-23); that he was charged and convicted of unauthorized use of the truck (R-24); that when he got into it the truck was parked on the side entrance by the door (R-24); that the Fat Boy closed about 4:30 or 5 o'clock in the morning, and there were no customers around when the truck came to deliver fish that morning (R-24); that he saw the driver of the truck when he came in, and spoke to him, but he did not ask permission of the driver to take a spin in the truck, "Wallace asked him something like that" (R.25); and he admitted that he testified in the first trial that he had obtained permission to take a spin in the truck, but that was not so (R-26).

Respondents called *George Edward Glascoe* as a witness, and he testified that he was employed by the petitioner in 1941, and made a delivery to the Fat Boy Restaurant on New York Avenue on the morning of the 7th of May, 1941 (R-28-29); that he arrived there about 7:40 in the morning, drove the truck in off Bladensburg Road, parked, and went in to make the delivery; that he inquired as to who would sign the receipt, found that Wallace Jones was the one to sign, they went downstairs, checked the order and Jones signed for it, they talked a few minutes, and he then came upstairs and found that the truck was gone (R-30); that he had left the keys in the truck; that he might have been in the Fat Boy five or ten minutes, and that he had no instructions about leaving the keys in the truck, but used his common sense, and removed the keys when he was going somewhere where it was crowded, but at the time he just intended to drop the order and come back out (R-31); that when he arrived at the Fat Boy Restaurant that morning there were not any cars parked there or any people loitering around on the outside, and he only saw three boys in the restaurant (R-32); that he had made deliveries to the Fat Boy Restaurant during a two year period, and always drove around in back of the building

and parked near the back door, and on the occasion in question he parked within five feet of the back door (R-33); that his delivery that morning consisted of 7½ pounds of halibut fish (R-34); that he had left the keys in the truck on prior occasions in making deliveries at the Fat Boy, and had never had any experience of anyone meddling with or taking the truck, and he knew that it was the practice of other drivers making deliveries there to leave keys in the trucks, and he had never heard of anyone having his car stolen (R-34); that there was a driveway leading off New York Avenue with parking facilities in back of the restaurant (R-35).

The petitioner called *Harry L. Claxton,* who testified that he was president of petitioner which was engaged in the seafood business and had been since 1888 (R-37-38); that the company had used trucks since 1912 (R-38); that George Glascoe was employed in June or July of 1939 as a driver of one of their delivery trucks, making deliveries to hospitals, restaurants, and institutions, and he was instructed that he should not carry any passengers, should drive the car carefully, and should not loan it to anyone (R-38); that the Fat Boy Restaurant on New York Avenue was one of his customers to which deliveries were made, and had been for about three or four years prior to the occurrence in question, and he had never had any experience at the Fat Boy, or anywhere else that he made deliveries, of anyone meddling with or stealing a delivery truck while making a delivery, and he never heard of anyone else having such experience at the Fat Boy Restaurant (R-38-39); that he never gave his drivers any instructions about leaving the keys in the ignition switch, as he hired competent drivers and left that to their judgment and good common sense (R-40); and that he had been to the Fat Boy Restaurant, and knew it to be in operation in the afternoon and mostly at night (R-41).

Petitioner called *Raymond L. Mitchell,* salesman for Charles Schneider Baking Company, who testified that he

sold bread on a route, making deliveries by truck, that he served the Fat Boy Restaurant, and had been serving it for about eight years; that he identified petitioner's Exhibit No. 8 as an accurate picture of the location of the Fat Boy Restaurant, as it had existed without any change during the time he had made deliveries there; that he usually drove in from New York Avenue, went around to the back of the building, parked his truck, rapped on the door, and then went in and made deliveries; that he left his key in the truck; that there was no one around in the morning at all; and that he had never had any difficulty with anyone tampering with or stealing his truck (R-41-43). The petitioner also called *Joseph Savia,* of the Quick Service Laundry Company (R-46); *Donald G. Norris,* of the Royal Crown Cola Company (R-49); *Eugene McMickle,* of David G. Tavan, beer distributor (R-51); *Harry C. Mantzouranis,* of the Versis Food Specialty Company (R-52); *Joseph E. Henson,* of M. E. Horton, Inc. (R-54); *Robert C. Deal,* of the Carry Ice Cream Company (R-56); and *Harris L. Atwill,* of the Wilkins Coffee Company (R-58); all of whom testified as to their respective experiences in making deliveries of merchandise to the Fat Boy Restaurant for varying lengths of time, as to their customary practice of driving around to the rear of the building, parking the truck and leaving the key in the ignition switch while making deliveries, as to the fact that there was no one around the building in the mornings, and as to the fact that they never had experienced any difficulty with anyone tampering with or stealing their trucks.

At the conclusion of all the evidence, counsel for petitioner moved the court to direct a verdict in behalf of petitioner upon the ground that respondents had failed to establish any facts or circumstances upon which the jury could find that it was reasonably forseeable in the exercise of ordinary care, when petitioner's driver parked the truck, that the truck would be stolen if left unattended with the key in the ignition switch, and thereby that respondents had failed to prove any actionable negligence on the part

of petitioner or that any negligence of the petitioner was the proximate cause of respondents' injuries (R-60-66). The trial judge was of opinion that the prior decision of the Court of Appeals prevented him from passing upon the legal sufficiency of the evidence to go to the jury, and in fact required that he submit the issues to the jury for decision, and thereby overruled the motion (R-66-67).

Petitioner submitted its Prayer No. 4, wherein it requested the trial judge to instruct the jury that:

> "The jury is instructed that the fact defendant left its delivery truck temporarily unattended and with the ignition key in the switch is not negligence in the absence of circumstances and conditions making it reasonably forseeable by defendant in the exercise of ordinary care that said truck would be stolen if so left."

The trial judge denied the prayer (R. 67).

Petitioner submitted its Prayer No. 5, wherein it requested the trial Judge to instruct the jury that:

> "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in motion the factors which accomplish the injury. It may operate directly or by putting intervening agencies in motion.
>
> "Causal connection between original negligence and an injury is broken when there intervenes a wilful, malicious and criminal act of a third person which causes the injury, provided that such intervening wilful, malicious and criminal act was not intended by the person originally negligent and could not have been foreseen by him in the exercise of ordinary care."

The court denied the second paragraph of requested Prayer No. 5, but in so doing stated, "I think that is sound law, personally, but I feel I am constrained by that case." (*Ross* v. *Hartman*, supra.) (R. 67, 68.)

Petitioner submitted its Prayer No. 6, wherein it requested the trial judge to instruct the jury that:

> "You are instructed that if you should find from the evidence that the defendant was negligent in leaving the truck in question unattended with the ignition key therein, you shall then consider whether or not such negligence was the proximate cause of the injuries sustained by the plaintiffs; and if you should find from the evidence that the defendant could not have foreseen, in the exercise of ordinary care under the circumstances and conditions then existing, that the truck would be stolen or was likely to be stolen if so left unattended with the key therein, and if you should further find from the evidence that the truck was stolen or taken by a third person and thereafter operated in a negligent and careless manner by such third person, and that such negligence of such third person was the direct and efficient cause of the injuries sustained by the plaintiffs, then, in such case, the negligence of the defendant would not be the proximate cause of the injuries sustained by the plaintiffs, and your verdict should be for the defendant" (R. 76).

The trial judge denied the prayer as submitted (R. 68). Thereupon, the trial judge instructed the jury, giving only general definitions of negligence (R. 70-71), and proximate cause (R. 72), and failing to charge in any manner as to any standard whereby responsibility of petitioner would be measured or affected by the presence or absence of circumstances and conditions making the taking or theft of the truck reasonably foreseeable by petitioner's driver in the exercise of ordinary care. At the conclusion of the trial judge's charge to the jury, counsel for petitioner invited his attention to this omission, but he allowed the charge to stand (R. 74).

The jury returned a verdict in favor of respondents in the sum of $5400 and costs; and judgment was entered on the verdict (R. 66, 67).

Petitioner filed a motion to set aside the verdict and judgment, and to enter judgment for the petitioner in ac-

cordance with its motion for directed verdict, or, in the alternative, to set aside the verdict and judgment for respondents and order a new trial (R. 77-79). The trial judge denied the motion in a memorandum opinion, in which the Court referred to the prior expressions of the said Court of Appeals in *Ross* v. *Hartman*, and in the first appeal in this case, and indicated that they set forth the law in this jurisdiction which a trial judge must follow (R. 79-80).

Petitioner thereupon took an appeal to the United States Court of Appeals for the District of Columbia.

Refusal of U. S. Court of Appeals to Pass Upon Substantial Questions Presented on Second Appeal.

Petitioner, in presenting its appeal to the U. S. Court of Appeals for the District of Columbia, urged upon the court that respondents had failed to establish any actionable negligence on the part of the petitioner, in that, when petitioner's driver parked the truck on private property in the rear of the restaurant and left it unattended with the key in the switch for a few minutes required to make a delivery, there were no circumstances making theft of the truck reasonably foreseeable by the driver in the exercise of ordinary care, and that he was not required to anticipate and guard against the remote or slight possibility of the truck being stolen if so left, and also urged that respondents had failed to establish that any such negligence was the proximate cause of the injuries sustained by them, in that theft of the truck was not reasonably forseeable in the exercise of ordinary care as a probable result of leaving it unattended and unlocked, and that the unexpected theft was an intervening and efficient cause that superseded any negligence of petitioner's agent, as well as the fact that the negligent operation of the truck by the thief was the real proximate cause of the injuries sustained by respondents.

Under these propositions, petitioner urged upon the said Court of Appeals that the District Court had erred in

denying petitioner's motion for directed verdict and in denying petitioner's Prayer's Nos. 4, 5 and 6.

However, the Court of Appeals handed down its decision on the 28th day of May 1948, affirming the judgment of the District Court, (R-81). in which it held that on the first appeal it had said:

> "the evidence in the present case should be submitted to the jury with instructions to find for the plaintiffs if they found that the defendant's driver was negligent in leaving the car unlocked and that the negligence was a proximate cause of the accident. * * * The case will therefore be remanded for a new trial.";

that "*the law stated in that opinion,*" (italics supplied), had been followed by the District Court upon the new trial, and that therefore the judgment was affirmed.

Petitioner filed a petition for rehearing, but the said Court of Appeals denied the same on July 17, 1948.

II.

Statement of Jurisdiction.

The United States Court of Appeals for the District of Columbia entered a judgment on May 28, 1948 (R-83) affirming the judgment of the District Court; which decision is reported in 169 F. (2d) 303. A petition for rehearing was timely filed. The Court of Appeals denied the petition for rehearing on July 17, 1948 (R-95).

Jurisdiction of this Honorable Court to grant certiorari is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. A. 347).

III.

Questions Presented.

1. Whether the United States Court of Appeals for the District of Columbia, in reversing a judgment of dismissal for failure to establish a case under the issues tried in the District Court, and remanding the case for a new

trial on a totally different issue, in a proper exercise of its appellate jurisdiction, may:

(a) Consider certain evidence found in the record on appeal, and, by pre-judging its legal sufficiency, direct and require the District Court, upon the new trial on such totally different issue, to submit the case to a jury for determination.

(b) Deprive petitioner of the right to have the trial judge consider and initially determine the legal sufficiency of all of the evidence adduced, and otherwise to pass on all legal questions arising during the new trial on such totally different issue, thereby denying petitioner a fair trial in accordance with accepted and usual procedures.

(c) Foreclose consideration and determination of substantial legal questions arising initially in the course of the new trial upon such totally different issue, by application of the "law of the case" doctrine.

2. Whether petitioner, in leaving a vehicle on private property, unattended, with the key in the switch for a few minutes, may be guilty of actionable negligence in the absence of some fact or circumstances making it reasonably foreseeable in the exercise of ordinary care that the vehicle would be stolen if so left.

3. Whether petitioner's leaving the vehicle on private property, unattended, with the key in the switch, may be deemed the proximate cause of injuries resulting to respondents, in the absence of some fact or circumstances making theft of the vehicle reasonably foreseeable in the exercise of ordinary care if so left, when respondents' injuries resulted from negligent operation of the vehicle by a thief who took the automobile and operated it to the point of collision some substantial distance away from the place where it was stolen.

4. Whether the District Court erred in denying petitioner's motion for directed verdict.

5. Whether the District Court erred in denying petitioner's Prayers Nos. 4, 5 and 6.

6. Whether the District Court erred in submitting the case to the jury for decision without any standard or guide whereby the jury might reach an informed and properly reasoned verdict upon consideration of the evidence.

IV.

Reasons Relied on for the Allowance of the Writ.

1. Petitioner has been denied a fair trial in that its opportunity to have a fair and full hearing upon a totally different issue was improperly and unreasonably impaired and restricted by the action of the United States Court of Appeals for the District of Columbia in pre-judging the legal sufficiency of certain evidence found in the record on a prior appeal and in directing submission of the case thereon to the jury for determination.

2. Petitioner has been denied due process of law in that the District Court has entered judgment against it and the Court of Appeals has affirmed that judgment without either the trial judge in the first instance or the Court of Appeals on the appeal therefrom, giving any real consideration to, or deciding, substantial legal questions raised by petitioner during the course of the trial.

3. Petitioner has been denied free and untrammeled consideration of substantial legal questions, probably demonstrating that the judgment against it is unlawful, upon the basis that such consideration is foreclosed by the "law of the case" doctrine, and great injustice and injury will result to petitioner unless this Honorable Court grants this petition and reviews the case.

4. Petitioner has been adjudged liable to pay substantial sums to respondents in the absence of any violation of any duty on its part and by the process of submitting the case to the jury for determination without any standard or guide whereby the result would be saved from the mischance of speculation upon a legally unfounded claim.

5. Petitioner has been required to go through the formality of a trial without having a fair opportunity to obtain consideration and determination of substantial legal questions arising during the course of such trial, in accordance with accepted and usual procedures.

6. The decision of the United States Court of Appeals for the District of Columbia is in conflict with applicable and controlling decisions of this Honorable Court.

7. The United States Court of Appeals for the District of Columbia has decided an important question of local law in a way probably in conflict with applicable local decisions.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the United States Court of Appeals for the District of Columbia be reversed by this Honorable Court and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Number ——.

R. W. CLAXTON, INCORPORATED, PETITIONER

vs.

BOYD F. SCHAFF, ET AL., RESPONDENTS

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Petitioner Has Been Denied a Fair Hearing By Unwarranted Action of the Court of Appeals.

The statement by the United States Court of Appeals for the District of Columbia that "Under that ruling [referring to the *Ross* case] the evidence in the present case should have been submitted to the jury," has been the cause of the predicament arising in this case. That sentence was unnecessary to the decision, and should be construed as dicta.

It was a mere expression of an opinion on a matter, the disposition of which was not required for the decision. *Barney et al.* v. *Winona & St. P. R. Co.*, 117 U. S. 228, 6 S. Ct. 654. As was very appropriately said by this Court

in *United States etc.*, v. *County Court of Clark County and the Justices thereof*, 96 U. S. 211, 24 L. Ed. 628, the "case called for nothing more; and if more was intended by the Judge who delivered the opinion, it was purely obiter."

It is the essential criterion of "appellate jurisdiction" that it revises and corrects the proceedings in a cause already instituted and does not create that cause. *Marbury* v. *Madison*, 5 U. S. 137, 2 L. Ed. 60; *Ex Parte Watkins*, 32 U. S. 568, 8 L. Ed. 786. Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. *Sibbald* v. *U. S.*, 37 U. S. 488, 9 L. Ed. 1167.

"It is not the function of an appellate court to assume the powers of the trial court. * * *." *Schilling, et al.*, v. *Schwitzer-Cummins Co.*, 79 U. S. App. D. C. 20, 142 F (2d) 82.

A party litigant has a right to the determination of the facts in the first instance by the trial court. *Chicago M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167, 44 L. Ed. 417, 422, 20 S. Ct. 336; *City of Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358, 24 S. Ct. 82. The evidence should be considered and passed on by the trial court before a reviewing court is called on to pass on it. *Wilson Cypress Co.* v. *Pozo*, 236 U. S. 635, 35 S. Ct. 446; *Oklahoma Natural Gas Co.* v. *Russell, et al*, 261 U. S. 290, 43 S. Ct. 353.

This rule has been heretofore followed by the United States Court of Appeals for the District of Columbia in *Washington and Georgetown Railroad Co.* v. *The American Car Co.*, 5 App. D. C. 524, where the Court said:

> "* * * We do not, of course, intend to be understood as in any manner qualifying the general principle that questions not made on the trial and presented to the court below for decision canont be entertained by this court. * * *"

An appellate court is not bound to anticipate—and should not anticipate—all of the questions that are likely to arise or might arise in the re-trial of a case when it reverses a

judgment and remands the case for re-trial. Hence the rule is "that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided." *Mutual Life Insurance Co. of N. Y.* v. *Hill*, 193 U. S. 551, 24 S. Ct. 538.

In the first appeal the "reversal operated to set aside the verdict and put the issues at large as they were before." *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 399, 33 S. Ct. 523. This is particularly true where, as here, respondents in the new trial completely abandoned their original theory of liability and the case was tried on a totally different issue.

The question as to whether or not the evidence adduced at the new trial on a totally different issue required submission of the case to the jury should have been determined by the trial judge "untrammelled by any supposed expression upon that point" by the United States Court of Appeals in its decision in the first appeal. *Prarie Farmer Publishing Co.* v. *Indiana Farmer's Guide Publishing Co.*, 299 U. S. 156, 57 S. Ct. 135, 81 L. Ed. 93.

As correctly stated by this Court in *Duke Power Co.* v. *Greenwood County, S. C.*, 299 U. S. 259, 57 S. Ct. 202, 81 L. Ed. 178,

> "If it appears that supervening facts require a re-trial in the light of changed situation, the appropriate action of the appellate court is to vacate the decree which has been entered and revest the court below with jurisdiction of the cause to the end that issues may be properly framed and the re-trial had."

In its decision on the first appeal, the United States Court of Appeals for the District of Columbia, in reversing the judgment of the District Court, did not revest the District Court with jurisdiction of the cause, to the end that totally different issues could be properly framed and a new trial had. On the contrary, the said Court of Appeals considered certain evidence found in the record on

appeal, prejudged its legal sufficiency, and directed and required the District Court, upon the new trial to be had on a totally different issue, to submit the case to a jury for its determination.

In so doing, it becomes manifest that the said Court of Appeals has exceeded its proper appellate jurisdiction, has usurped the essential prerogatives of the District Court to consider and initially determine the legal sufficiency of all of the evidence which might be adduced during the new trial, and otherwise to pass on all legal questions which might arise.

In the nature of things, petitioner had neither the occasion nor the opportunity to meet the evidence which was considered by the said Court of Appeals. Neither has petitioner had a fair opportunity to obtain consideration and determination of substantial legal questions arising for the first time during the new trial. Petitioner has, therefore, been denied due process of law, since it has been deprived of the accepted and usual procedures afforded litigants in civil actions.

II.

The "Law of the Case" Doctrine Cannot Properly Be Applied in the Retrial of an Action on a Totally Different Issue.

The application of the "law of the case" doctrine by the United States Court of Appeals for the District of Columbia, in summarily disposing of the second appeal, necessarily means that the statement of said Court of Appeals in its decision in the first appeal that "the evidence should have been submitted to the jury", was intended to mean and did in fact mean that the Court held, as a matter of law, that the fragmentary and unresisted evidence contained in the record in the first appeal was sufficient to make out a cause of actionable negligence and required submission of the case to the jury. The trial judge felt constrained to so construe the decision. It now appears

that the said Court of Appeals in its decision in the second appeal, has given the same binding interpretation and effect to the above quoted fortuitous statement.

The "law of the case" doctrine affects the retrial of an action after reversal only insofar as the issues of fact, the evidence, and the applicable law are substantially the same as upon the first trial. The doctrine of the "law of the case" is not an inexorable command. It "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power". *Messinger* v. *Anderson*, 225 U. S. 436, 444, 32 S. Ct. 739, 740. "It does not have the effect of placing the issue, the evidence, or even the applicable rules of law in a straight-jacket." *Miller's Mutual Fire Insurance Assoc.* v. *Bell*, 99 F. (2d) 289 (C. C. A. 8).

Where, as here, following the reversal of the District Court in the first appeal, amended pleadings were filed and substantially different evidence was developed in connection therewith, and the retrial was governed by entirely different principles of law, it cannot be said under any conceivable hypothesis that the doctrine of the "law of the case" could be properly invoked. Plainly, no "law of the case" could be established by mere dicta. The error is substantial, because petitioner has thereby been foreclosed from obtaining a decision upon substantial legal questions arising for the first time during the retrial of the case upon a totally different issue.

III.

Theft of the Truck Was Not Reasonably Foreseeable in the Exercise of Ordinary Care, and Neither Negligence Nor Proximate Cause Was Established by the Evidence.

Respondents were injured as a result of negligent operation of petitioner's truck by a thief. They allege that their injuries were proximately caused by the negligence of petitioner's driver in leaving the truck unattended with the

key in the ignition switch. The evidence disclosed that, when the driver parked the truck, there were no conditions or circumstances existing as would put a reasonably prudent person on notice that theft of the truck was a likely consequence of leaving it unattended with the key in the switch. Nothing of the kind had ever happened before.

In *Ross* v. *Hartman*, 78 U. S. App. D. C. 217, 139 F. (2d) 14, the Court of Appeals said:

> "Everyone knows now that children and thieves frequently cause harm by tampering with unlocked cars. *The danger that they will do so on a particular occasion may be slight or great.* In the absence of an ordinance, therefore, leaving a car unlocked might not be negligent *in some circumstances* although in other circumstances it might be both negligent and a legal or 'proximate' cause of a resulting accident." (Emphasis supplied.)

As authority for the aforesaid statement that "in some circumstances" both negligence and proximate cause may exist, the Court of Appeals cited certain decisions by New York courts, mainly: *Lee* v. *Van Buren and New York Bill Posting Co.*, 190 App. Div. 742, 180 N. Y. S. 295; *Gumbrell* v. *Clausen Flanagan Brewery*, 199 App. Div. 778, 192 N. Y. S. 451; *Connell* v. *Berland*, 233 App. Div. 234, 228 N. Y. S. 20; *Maloney* v. *Kaplan*, 233 N. Y. 426, 135 N. E. 838.

In the *Lee*, *Gumbrell* and *Connell* cases, the vehicle was left unattended with the key in the switch, and was of such construction that it could be started up by merely moving a lever. Children at play got on the vehicle and moved the lever, and the vehicle thereupon was set in motion and caused to strike the party injured. In each case there was prior notice of children playing on the vehicle. In the *Maloney* case, the vehicle was parked on a grade, and started up and rolled down the grade, either because it had not been securely parked or because some meddlesome boys released the brake.

The New York courts have established beyond question, and with compelling logic, that the owner of a vehicle is not negligent in leaving a vehicle unattended with the key in the switch, unless the circumstances then existing make it reasonably foreseeable in the exercise of ordinary care that the vehicle will be meddled with if so left. *Tierney, etc.* v. *New York Dugan Bros.*, 288 N. Y. 16, 41 N. E. (2d) 161, 140 A. L. R. 534; *Kaplan* v. *Shults Bread Co.*, 212 App. Div. 110, 208 N. Y. S. 118; *Mann* v. *Parshall*, 229 App. Div. 366, 241 N. Y. S. 673; *Touris* v. *Brewster and Co.*, 235 N. Y. 226, 139 N. E. 249; *Walter* v. *Bond*, 267 App. Div. 779, 45 N. Y. S. (2d) 378; *Pesaty* v. *Hearn and Son*, 202 N. Y. S. 264; *Vincent* v. *Crandall and Godley Co.*, 131 App. Div. 200, 115 N. Y. S. 600; *Berman* v. *Shultz*, 40 Misc. Rep. 212, 81 N. Y. S. 647.

The same rule has been established as the law by decisions of courts in other jurisdictions. *Jackson* v. *Mills-Fox Baking Company*, 221 Mich. 64, 190 N. W. 740, 26 A. L. R. 906; *Rhad* v. *Duquesne Light Co.*, 255 Pa. 409, 100 Atl. 262.

Even if deemed negligence, the act of leaving the vehicle unattended with the key in the switch must be the proximate cause of respondents' injuries before any liability can be imposed. Proximate cause exists only when "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances." *Milwaukee and St. Paul R. Co.* v. *Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 256. "Events too remote to require reasonable provision need not be anticipated." *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 88 L. Ed. 239.

In every case that counsel have been able to find wherein the vehicle was stolen and injury caused to another by negligent operation on the part of the thief, the courts have held that any act of negligence of the owner in leaving the vehicle unattended with the key in the switch was not the proximate cause of such injury. *Slater* v. *T. C. Baker Co.*, 261 Mass. 424, 158 N. E. 778; *Sullivan* v. *Griffin*, — Mass.

—, 61 N. E. (2d) 330; *Lotito* v. *Kyriacus, et al,* 74 N. Y. S. (2d) 599, 600, 601.

IV.

This Court Is Not Bound by Any "Law of the Case" and Should Review the Judgment to Prevent a Manifest Injustice.

After a Circuit Court of Appeals has affirmed a judgment on the ground that their decision in an earlier appeal has become the "law of the case", this Court is nevertheless free to take the case on certiorari and reverse the judgment. *Panama Railroad Co.* v. *Napier Shipping Co.,* 166 U. S. 280, 284, 17 S. Ct. 572. This Court frequently does so. *Western Union Telegraph Co.* v. *Czizek,* 264 U. S. 281, 44 S. Ct. 328; *American Surety Co.* v. *Greek-Catholic Union,* 284 U. S. 563, 52 S. Ct. 235; *Illinois Central RR Co.* v. *Crail,* 281 U. S. 57, 50 S. Ct. 180.

The judgment of the said Court of Appeals on the second appeal must stand or fall on its merits and has no improved standing before this Court from the fact that it resulted from an application of that Court's "law of the case". cf *White* v. *Higgins,* 116 F. (2d) 312, (CCA 1). When this Court, in the exercise of its supervisory jurisdiction issues a writ of certiorari to bring up the whole record, the entire case is before this Court for examination. *Panama Railroad Co.* v. *Napier Shipping Co.,* supra; *Messinger* v. *Anderson,* 225 U. S. 436, 444, 32 S. Ct. 739, 740.

The judgment of said Court of Appeals in the first appeal, merely reversed the judgment of the District Court, and ordered a new trial. Essentially, it was interlocutory in nature. Now that the case has proceeded to a final judgment in said Court of Appeals, petitioner is entitled to its correction. *U. S.* v. *Beatty,* 232 U. S. 463, 34 S. Ct. 392; *U. S.* v. *Denver & R. G. R. Co.,* 191 U. S. 84, 93, 24 S. Ct. 33.

The earlier adjudication was plainly wrong, and the erroneous application of the doctrine of the "law of the case"

works a manifest injustice to petitioner, since it has never had an opportunity to have any judge or any court give due and proper consideration to its contentions. This Court should therefore reverse the judgment.

Respectfully submitted,

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